Supreme Court, U.S.
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No. 01-229

IN THE

Supreme Court of the United States

GREAT LAKES DREDGE AND DOCK COMPANY,

Petitioner,

v.

BEYEL BROTHERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should this Court entertain a petition seeking review of the *per curiam affirmance* by the Eleventh Circuit Court of Appeals which merely affirms this Court's long standing rule as set forth in *Stephens v. The White City*, 285 U.S. 195 (1932) and is not in conflict with any other Court of Appeals.

Did there exist a duty of explanation in this case?

Petitioner's assertion of "whether or not a damaged unmanned tow satisfies this burden by evidence of an occurrence or damage that is inconsistent with proper towage coupled with a failure of explanation by the tug" begs the question. Conveniently left out of the question is the undisputed fact that the tow had the absolute obligation to furnish a seaworthy tow and did not inspect the tow for 72 days while leaving the raft of pipe in the mud subject to tidal changes and the wakes of passing vessels prior to authorizing Beyel Brothers to undertake the tow. There is no "duty of explanation" under these circumstances by the tug.

STATEMENT PURSUANT TO RULE 29.6

Respondent, eyel Brothers, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF THE CASE

Respondent finds it necessary to set forth its own statement of the case so that the Court is fully advised of the issues presented to the trial court and to the Eleventh Circuit Court of Appeals.

Ironically, the Petitioner takes no issue with the Eleventh Circuit Court of Appeals' opinion in this case nor in a companion case brought by a wholly owned subsidiary, i.e. NATCO, in which they set forth the trial court and Eleventh Circuit's opinions as part of the Appendix (see Petitioner's Appendix D, E and F). Not surprising, virtually the same issues are involved in the *NATCO*, *supra*, case concerning a tug and tow. After losing in the Eleventh Circuit, the Petitioner herein did not seek certiorari in the *NATCO* case, even though allegedly the same grounds existed at that time as at the present time for seeking certiorari.

Since Petitioner's Statement of the Facts leaves out several extremely important facts, the Respondent supplements the Statement of the Facts as set forth below.

Great Lakes, one of the world's largest dredging contractors with significant expertise in dredge pipe use and maintenance contracted with Beyel to arrange for towage of five pieces of dredge pipe from Port Canaveral, Florida to Wilmington, North Carolina, in early March, 1997. The pipe had been previously used for a beach restoration project in West Palm Beach and the pipe was brought up the coast to Hutchinson Island Restoration Project in Hutchinson Island, Florida (R-5-107-2) (R-2-53)[1]. At the completion of the Hutchinson Island Restoration Project, Great Lakes brought the pipe to its yard in Green Cove Springs, Florida where

1. Reference to the record on appeal will be designated by "R" followed by the volume number and page.

the pipe sat rafted until early February, 1997 when Great Lakes had it towed, by the Atlantic Ocean, to Cape Canaveral in anticipation of its use for a beach renourishment project (R-5-017-2) (R-2-53). Shortly thereafter, the Canaveral Beach Restoration Project was canceled and the pipe sat on the shoreline near Beyel's property and was subjected constantly to tidal changes and passing ship wakes that may have damaged the pipe and weakened the raft. (R-5-107-2) (R-2-53). **At all times relevant to all matters in this case, it was totally undisputed that Great Lakes was solely responsible for the rafting and seaworthiness of the pipe.** (*See* Petitioner's Appendix B, 16a n.4). After beaching the pipe in February, 1997 in the mud in Cape Canaveral, the pipe sat unattended and uninspected by Great Lakes. The tow began on April 20, 1997, again without inspection by Great Lakes of the tow of rafted pipe. This was a period of 72 days in which Great Lakes took no inspection, precautions or other actions to fulfill its obligation to furnish a seaworthy tow. (R-2-53-4). The Court's order as set forth in Appendix B of Petitioner's brief, sets forth the findings of the Court.

It is firmly established that the owner of a tow (here Petitioner) owes an absolute duty to the tug (Respondent) that the tow is seaworthy. *Curtis Bay Towing Co. v. Southern Lighterage Corp.* 200 F.2d 33, 34 (4th Cir. 1952); *Derby Company, Ltd. v. A.L. Michling Barge Lines, Inc.*, 258 F. Supp. 206, 211, *aff'd*, 399 F.2d 304 (5th Cir. 1968).

REASONS FOR DENYING THE WRIT

This Court's opinion in *Stephens v. The White City*, 285 U.S. 198 (1932) has served the maritime industry well. Contrary to the petition filed by Petitioner, there is no hue and cry from the courts of this country for this Court to revisit that decision. Maritime commerce operates smoothly when the conditions of the tug and tow are, as they are normally in

the world of marine commerce, such that the tow has full responsibility for and assumes full responsibility for having a seaworthy tow ready to be transported by the tug from one point to another. Petitioner's assertion that there is clamoring to have the *Stephens v. The White City* overturned, is unfounded. In fact, it is noteworthy that in the 69 years since *Stephens supra*, was decided, there have only been three commentators, (secondary or less authority), calling for the matter to be revisited. The motivation for these articles is unknown. However, it is clear that should the law of this country ever determine that the tug creates a bailment by virtue of a tow arrangement, then the cost of marine transportation in America, already approaching the point of being non-competitive in the world market, would deliver a crippling blow to American water transportation.

More importantly, the Petitioner below never raised in the Eleventh Circuit Court of Appeals that *Stephens v. The White City, supra* was improperly applied by the court nor, in their brief, reply brief, or petition for rehearing, did they ever urge the Eleventh Circuit that *Stephens v. The White City* was not appropriately interpreted by the Eleventh Circuit in not only this case, but in a companion case involving a wholly owned subsidiary which is set forth by Petitioner in its Table of Appendices D, E and F.

Again, contrary to the Petition filed by Petitioner, there is no conflict between the Eleventh Circuit *per curiam affirmance* and any decision of this Court nor was such a contention ever raised in the Eleventh Circuit Court of Appeals. This case, as well as the *NATCO* case, *supra*, (from which Petitioner chose not to seek certiorari), involved a very run-of-the-mill tug-tow case that in no way altered the long-standing and very viable precedent of this Court found in *Stephens*, *supra*, and subsequent cases.

As demonstrated by the opinion below, as well as the opinion of the Eleventh Circuit in NATCO (see Petitioner's Appendix D, E and F), the Eleventh Circuit found both cases so ordinary and devoid of any controversy, that no opinion was even issued on either case. To conclude from a *per curiam affirmance* that this case conflicts with this Honorable Court's decision flies in the face of reality.

CONCLUSION

For the above reasons, as well as those portions of the record referred to in this brief, Respondents respectfully request this Honorable Court deny the Petition.

Respectfully submitted,

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